



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 20, 2004

Mr. Delmar L. Cain  
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The Texas A&M University System  
200 Technology Way, Suite 2079  
College Station, Texas 77845-3424

OR2004-6011

Dear Mr. Cain:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205653.

Prairie View A&M University (the "university") received a request for 10 categories of information relating to a named student, a named university employee, and policies or procedures concerning the cheerleading squad. You inform us that the university will release some of the requested information.<sup>1</sup> You claim that other responsive information is excepted from disclosure under sections 552.026, 552.101, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally

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<sup>1</sup>You inform us that personal information will be redacted from the individual's personnel file prior to its release. You have not requested a ruling with regard to the information that you intend to withhold. We note that section 552.301 of the Government Code requires a governmental body to ask this office to decide whether requested information is excepted from public disclosure, unless there has been a previous determination that the requested information is subject to one of the statutory exceptions. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Section 552.026 incorporates FERPA into chapter 552 of the Government Code and provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Generally, FERPA requires that information be withheld from the public only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978); *see also* 34 C.F.R. § 99.3 ("personally identifiable information" includes, among other things, "[o]ther information that would make the student's identity easily traceable").

Section 552.114 excepts from public disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114 as the equivalent of "education records" that are protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).<sup>2</sup>

You inform us that the submitted documents contain information that identifies students of the university. You also point out that the requestor knows the identity of one of the students to whom the submitted information pertains. Based on your representations, we have marked the submitted information that is confidential under FERPA. The university must not release that information unless it has authorization under FERPA to do so.

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<sup>2</sup>In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold information that is protected by FERPA and excepted from public disclosure under sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) a state-funded educational agency or institution may withhold information that is excepted from public disclosure under section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision under section 552.114. *See* Open Records Decision No. 634 at 6-8 (1995).

Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained.

Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You inform us that Exhibits C-1 and C-2 are communications between university administrators and their attorney. You state that these communications were made in the course of providing professional legal services to the university. You also inform us that these communications were intended to be and remain confidential. Based on your representations, we conclude that the university may withhold Exhibits C-1 and C-2 under section 552.107(1).

Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open

Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Ordinarily, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You inform us that the information submitted as Exhibits B and D relates to an ongoing investigation of an accident involving a university cheerleader. You explain that Exhibit B is a draft of a document that will be released when completed. You state that Exhibits B and D concern university policy issues with regard to the cheerleading program. Based on your representations, we conclude that the university may withhold Exhibits B and D under section 552.111.

Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former

employee of a governmental body who requests that this information be kept confidential under section 552.024. The determination of whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the university may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the university's receipt of the request for the information. Information may not be withheld on behalf of a current or former university employee who did not make a timely election under section 552.024 to keep his or her section 552.117 information confidential.

We have marked information in Exhibit E that may be excepted from disclosure under section 552.117(a)(1). The university must withhold the marked information if the current or former employee to whom it pertains timely elected under section 552.024 to keep the information confidential.<sup>3</sup>

A social security number is excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have not cited, nor are we aware, of any law enacted on or after October 1, 1990 that requires or authorizes the university to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number contained in the submitted documents was obtained or is maintained under such a law so as to be confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the university should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

Section 552.137 is applicable to certain e-mail addresses. As amended by the 78<sup>th</sup> Legislature, this section provides as follows:

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<sup>3</sup>We note that a post office box number is not a "home address" for purposes of section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)).

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 is not applicable to the types of e-mail addresses listed in section 552.137(c) or to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked an e-mail address that the university must withhold under section 552.137, unless the owner of this e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the university must not release the information that is confidential under FERPA unless it has authority under FERPA to do so; (2) the university may withhold Exhibits C-1 and C-2 under section 552.107(1); (3) the university may withhold Exhibits B and D under section 552.111; (4) the university must withhold the section 552.117(a)(1) information of a current or former employee who timely elected under section 552.024 to keep that information confidential; (5) the university may be required to withhold a social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (6) the university must withhold the e-mail address under section 552.137 unless the owner of the e-mail address has affirmatively consented to its public disclosure. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

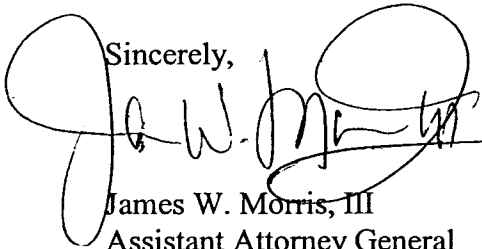
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 205653

Enc: Submitted documents

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(w/o enclosures)